Liberty Homes, Inc. *and* Chauffeurs, Teamsters, Warehousemen and Helpers, Local No. 446, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 18-CA-6440

September 17, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 30, 1980, Administrative Law Juge Thomas R. Wilks issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party filed a memorandum answering Respondent's exceptions. Respondent subsequently filed a motion to reopen the record and for leave to adduce additional evidence to which the General Counsel and the Charging Party filed oppositions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge concluded that certain statements and interrogations by Potts, Respondent's dealer relations manager, in conversations with employees Ramker, Ploeckelman, and Metz concerning conditions of employment and the mistake it would be for the employees to seek union representation, violated Section 8(a)(1) of the Act.[1]

The Administrative Law Judge further concluded that Respondent violated Section 8(a)(3) and (5) of the Act by subcontracting out the balance of its over-the-road delivery operation, apparently reasoning that Respondent did not make any decision on that matter until after the employees had designated the Union as their representative and in retaliation therefor.[2]

Respondent in its exceptions contends, *inter alia*, that, in assessing the evidence as to the 8(a)(3) and (5) allegations, the Administrative Law Judge in effect erred by not assigning weight to Respondent's economic losses from its drive-away operation, and that he failed to address pertinent evidence showing that Respondent's decision to discontinue its own portion of the delivery operation was made before the employees concerned decided upon union representation on September 23. We find merit in these contentions.

At the hearing herein, the General Counsel argued that "one of the very critical elements is the time frame in which Respondent initiated inquiries concerning the contracting out of its drive-away" operation.[3] We agree with the General Counsel that *when* Respondent initiated such inquiries is important. We conclude that the documentary evidence fully supports Respondent's testimony that its inquiries were begun several months before the employees sought union representation, and that Respondent continued to pursue that course of conduct throughout the summer. In this connection, we note that, following a hearing in Case 18-RC-12417, the Regional Director, on October 24, 1979, issued a Decision and Order in which he dismissed the Union's petition[4] after concluding that Respondent had made a final decision to subcontract prior to the employees' seeking union representation, and that it would therefore not effectuate the policies of the Act to conduct an election. The record herein shows that a number of documents pertaining to Respondent's decision to subcontract its drive-away operation were subpenaed in preparation for that representation proceeding (including Resp. Exh. 2 herein, a bid dated March 1 from a possible hauler), and that many were admittedly in the possession of the Charging Party or the General Counsel at the time of the hearing in this proceeding—some 8 months later. In our view, it is inconceivable that if either the General Counsel or the Charging Party had deemed any of those documents to contain evidence favorable to their position on the timing of the subcontracting they would have failed to introduce them into evidence herein. But neither sought to do so. We therefore infer that they contain no evidence to support the General Counsel's contentions.

While the Administrative Law Judge at one point in his Decision recognized Respondent's

[1] The record indicates that the employees accurately stated that they were unaware of any union activity. Potts did not testify. The Administrative Law Judge "[a]ccordingly . . . credit[ed] the testimony of [the] General Counsel's witnesses inasmuch as their testimony was not inherently unbelievable, and their demeanor was sufficiently convincing." The record shows that the employees' first organization meeting occurred at the home of employee Paschke on Sunday, September 23 (inadvertently referred to by the Administrative Law Judge as September 24).

[2] The Administrative Law Judge's rationale is ambiguous given his discussion of, and apparent reliance on, *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). We do not consider that decision germane.

[3] This argument on timing arose in conjunction with Resp. Exh. 2, a response dated March 1, 1979, from one of the vehicle haulers interested in obtaining Respondent's business.

[4] The Union's petition sought a unit of the employees whose organizing activities are reflected in this proceeding. Respondent's production and maintenance employees at this location are separately represented.

mounting economic losses from the delivery operation (the operation produced a $10,000 profit in 1977, a $2,600 loss in 1978, and a $34,500 loss by August 1979), he apparently did not apprehend the evidence as substantiating Respondent's contention that a primary reason for its increasing losses was the rapidly escalating cost of maintenance ($54,000 by August 1979) due to the inadequacy of its gasoline-powered tractors to withstand the heavier hauling that they were being required to perform. Although not specifically addressed by the Administrative Law Judge, the basic factors contributing to an increased demand on Respondent's vehicles appear evident from the record. First, the weight of many of Respondent's larger (14 feet by 70 feet) mobile homes was being increased by design and structural changes. Second—and perhaps more significantly—in terms of output, the quantity of such larger and heavier homes rose during the period in question from 30 to approximately 50 percent of Respondent's production at the location here involved.[5]

It appears, in fact, that the Administrative Law Judge in arriving at his conclusions herein may have substituted his own business judgment for that of Respondent as reflected in his apparent criticism of Respondent for not raising prices or delivery charges to customers.

Finally, we note that the Administrative Law Judge apparently failed to consider the evidence by Bruce Beeman[6] that he was told by Potts "by early September" that Respondent was "definitely going to close down its trucking operations," and that if Barrett (a hauler Beeman worked for) "wanted to be considered we had better get our quotes in."[7] Further, Zabrosky had frequently expressed to Beeman his concern that gas-fueled tractors were breaking down with the heavy loads, and that he wanted only diesel tractors used. The evidence, of course, is entirely consistent with the conclusions reached by the Regional Director in the representation proceeding,[8] and in our view compels the conclusion that Respondent's decision to cease its own portion of the delivery operation and to subcontract it out based on its mounting economic losses had in fact already been made before the employees decided on September 23 to seek union representation. Hence, we conclude that Respondent was not obligated to bargain with the Union over its decision to close.[9]

Accordingly, we conclude that there was no discrimination against employees to discourage union membership in violation of Section 8(a)(3) and no refusal to bargain concerning terms and conditions of employment of drivers in violation of Section 8(a)(5). Therefore we dismiss the 8(a)(3) and (5) allegations of the complaint in their entirety.[10]

[5] As noted by the Administrative Law Judge, Division Manager Zabrosky had initially recommended as an alternative to subcontracting out the drive-away operation, the possibility of replacing existing gasoline-powered tractors with diesel tractors—a step which the home office was apparently unwilling to take because of the large increase in capital outlay; i.e., $30,000 to $35,000 per diesel tractor versus approximately $10,000 to $15,000 per gasoline-powered tractor. We note the testimony of employees that, at the meeting between Respondent and the drivers informing them of the final date that the trucks were to be taken off the road, Zabrosky informed them that, although the trucks might be available for purchase if the employees desired to buy, he would advise them against it inasmuch as he considered the gasoline-powered tractors not heavy enough to make them a "good" buy. We further note that following the takeover of the balance of Respondent's drive-away operation involved here, approximately 80 percent of the equipment used in hauling Respondent's mobile homes was comprised of diesel tractors.

[6] Beeman's testimony is contained in an affidavit secured by Respondent. The affidavit states that Beeman would be unavailable to testify on the date of the hearing as he would be out of the State at the time. Counsel for the General Counsel initially objected to the receipt of the affidavit into evidence. However, when Respondent requested a continuance, both counsel for the General Counsel and counsel for the Charging Party preferred to have the affidavit received rather than a continuance to secure testimony from Beeman in person. The Administrative Law Judge commented on the record that in his view "Beeman's testimony is corroborative of the essence of Respondent's defense. The timing of the proposal and so forth, is highly critical. I would think that his testimony should be adduced in this proceeding."

[7] Beeman confirmed this in writing on September 13, and delivered a submission which required "many hundreds of computations" to Respondent on September 24.

[8] That representation case was dismissed because in "mid-September" Respondent had reached a final decision to subcontract unit work. We also conclude, contrary to the Administrative Law Judge, that Respondent's taking delivery, early in the year, of trucks previously ordered by the home office, installing a previously ordered gas tank to compensate for difficulties in obtaining gasoline supplies, and equipping trucks with replacement tires "do not provide a basis to find otherwise."

In noting above that the evidence herein is consistent with the Regional Director's dismissal in the representation proceeding, we have not, contrary to our dissenting colleague, misplaced reliance on that decision as "a proof" in the instant case. We merely recognize that a basic threshold issue in the two cases is essentially the same; i.e., whether Respondent's basic decision to use haulers for the balance of its delivery work was effectively made prior to the employees' deciding to organize in late September. Nor does the fact that we reach the same ultimate conclusion as the Regional Director in any way impinge on the General Counsel's authority in processing unfair labor practice cases.

[9] It appears that our dissenting colleague may be interposing his business judgment for Respondent's in analyzing the legality of Respondent's decision to use outside haulers in terms of whether Respondent adequately considered an impliedly desirable "possible resolution" which "could have resulted in a retention of the employees and their bargaining representative." That seems to us to somewhat miss the point of whether Respondent's decision was arrived at, as we have found, before the advent of any bargaining representative. Moreover, his reliance on a lack of specific comparison in the record of delivery figures for different haulers seems somewhat puzzling given that the documents in question were entered into evidence primarily to show when Respondent's inquiries were undertaken—which the General Counsel asserted was a critical issue—and that Respondent previously had permission to delete the specific figures and the many pages of supporting quotations from the exhibits (indeed, the General Counsel subsequently objected when Respondent offered to later submit the attachments to the original quotations). Finally, our colleague in declaiming what he terms Zabrosky's "steadfast refusal" to subcontract seems to forget that the decision was not Zabrosky's to make, and that Zabrosky had recommended such action several months beforehand.

[10] It is uncontested that Respondent offered to bargain with the Charging Party (given a showing of majority status) over the *effects* of its decision to cease its portion of the delivery operations, but that such offer

Continued

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Liberty Homes, Inc., Dorchester, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their own and other employees' union activities.

(b) Warning employees that joining a union will not benefit them and may result in the loss of over-the-road driving jobs.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Post at its facility in Dorchester, Wisconsin, copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 18, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

MEMBER JENKINS, dissenting:

I think it clear that Respondent's subcontracting of its trucking operations violated Section 8(a)(3) and (5) of the Act.

The basic facts are undisputed and show that Respondent's drive-away or delivery operation earned a $10,000 profit in 1977, lost $2,600 in 1978, and suffered a cumulative loss of $34,500 by August 1979. In late 1978 or early 1979, because of the rising costs of maintenance and operation of its gasoline-powered trucks, Respondent initiated inquiries concerning the feasibility of subcontracting out the operation and pursued those inquiries through late autumn 1979. During the summer of 1979, it also considered, but decided against, replacing half of its truck fleet with diesel-powered vehicles because of the expense of acquiring diesel power. Meanwhile, in June 1979, its drivers began discussing the possibility of union representation, and, in mid-July 1979, driver Ramker told Respondent's dealer relations manager, Potts, of the drivers' dissatisfaction with employment conditions and that they would "go union" if improvements were not made. Potts' response was that such a move would be a "bad mistake." Although the employees did not engage in any further union or concerted activity until September 21, 1979, Potts believed otherwise and, in July, interrogated driver Ploeckelman as to whether he planned to attend a union meeting, interrogated driver Metz on July 27 or August 3 as to whether Metz had heard of any union meetings to be held that night, and then requested him, "as a personal friend," not to attend union meetings.

Concurrent with these transgressions, Beeman, who represented a carrier with which Respondent was negotiating, stated in an affidavit that he was told by Division Manager Zabrosky, Potts' immediate supervisor, "by early September" that Respondent was "definitely going to close down the trucking operation" because of economic factors and "we had better get our quotes in." Respondent, however, neither closed nor received a bid from Beeman in September, and, in early September, Potts continued on his unlawful course by asking Ramker if he had heard anything about the Union and whether he knew who initiated the union movement.

On September 21, the employees met with Hansen, the Union's business agent and, on September 24, armed with union authorization cards executed by all of the drivers, Hansen presented a request for recognition and bargaining to Zabrosky. According to Zabrosky's discredited testimony, he stated that he told Hansen that the Union was "a dollar short and a day late," and that Respondent had decided to subcontract out the operation to a common carrier. According to Hansen's credited testimony, Zabrosky stated that he was investigating the possibility of subcontracting the drivers' work and was, at that time, gathering information as to costs and negotiating with contract carriers. On the following morning, despite the asserted finality of Respondent's decision, Potts summoned Metz to his office and berated him for not telling

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was clearly rejected. In view of our result herein, we find it unnecessary to reach Respondent's motion to reopen the record to submit additional evidence of mounting losses on its Dorchester trucking operations during 1980.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Potts about the September 21 union meeting, interrogated him as to whether he had signed a union card, and, when told that he had, responded that he, Potts, did not believe that Respondent "would go along with joining a union," that it did not benefit Metz to join the Union, that Respondent "would probably take the trucks off the road," and that the least senior driver Metz "could have moved up the ladder to become a higher driver on the totem pole."

As of this time, Respondent admittedly still was negotiating with three contract carriers for a special rate. Although one carrier, MTS, had submitted a rate quote to Respondent on March 1, 1979, it did not have Interstate Commerce Commission authority to service Respondent's area. In May, Barrett, another carrier, refused to provide Respondent with a special rate. In August, Zabrosky offered to award all of Respondent's delivery work to Morgan, the third carrier involved, *if* Morgan would grant Respondent a special rate, which it refused to do. On August 27, 1979, MTS submitted a second bid which was rejected by Zabrosky, who continued to search for a special lower rate. Neither Barrett nor Morgan had yet submitted a quoted contract price. It was not until after the Union's bid for recognition that Respondent received bids from those two carriers, and it was not until after November 5, 1979, that Zabrosky compared the submitted bids and engaged a carrier, thereby apparently abandoning his year-long search for a special contract rate. Despite his search for that special lower rate, however, Zabrosky admittedly knew that the rate charged by a carrier is controlled by the Interstate Commerce Commission. He apparently also knew that, while that rate was inflexible, carriers may not necessarily charge the same fee for delivering the same size product to the same location because of the manner in which they compute mileage for that delivery. Zabrosky, however, was not seeking this type of accommodation. His efforts were spent in trying to obtain a special lower rate.

Beeman's affidavit, then, is almost the sole bit of evidence on which my colleagues rely for their conclusion that Respondent's decision to subcontract out the delivery work was made final prior to the Union's September 24, 1979, request for recognition. Beeman stated Zabrosky told him "by early September" that Respondent was "definitely going to close down its trucking operation . . . [and] we had better get our quotes in" because Zabrosky wanted only diesel tractors used. That statement, at best, is ambiguous as to timing and self-serving as to motivation. Further, it fails to show that, "by early September," Respondent was any closer to a final decision to subcontract out than it had been at any time since it initiated its quest for a special rate in early 1979. Moreover, inasmuch as Beeman was so told by Zabrosky, the statement is no more definitive as to timing or economic motivation, or entitled to more weight, than Zabrosky's discredited testimony that a final decision had been made prior to the request for recognition. I agree with the Administrative Law Judge that it is highly improbable that a final decision would have been made prior to the acquisition of all essential data.

Throughout their opinion, my colleagues have cited the Regional Director's decision in Case 18-RC-12417 and the proceedings leading to that decision as indicating that a final decision had been reached prior to the advent of the Union. Nevertheless, they contend that their repeated references to that determination are not as "a proof," but merely in recognition "that a basic threshold issue in the two cases is essentially the same." This repeated reference seems to me to indicate otherwise, and I think it plain that the Regional Director's decision has no relevance to this proceeding. The Regional Director did not have before him the facts present in the instant proceeding, and, under the statute, the General Counsel has the sole authority to initiate unfair labor practice proceedings which then must be determined *ab initio* from the facts therein presented.

The General Counsel's possession of some of the documents on which the Regional Director may have relied does not, contrary to my colleagues, create an obligation on the part of the General Counsel to introduce them into evidence as part of his case-in-chief, nor create the inference that they do not support his position if he does not. My colleagues' conclusion presupposes that those documents have evidentiary value in this proceeding. But, even if they have, economic data assertedly supportive of its positions is peculiarly within Respondent's knowledge, and the burden is on Respondent, not the General Counsel, to produce such evidence or else sustain an adverse inference.[12] The majority effectively imposes on the General Counsel the burden of establishing Respondent's defense. More pointedly, the adverse inference drawn by the majority flies in the face of the record, which shows that Respondent did introduce into evidence copies of the same or like documents, and that it undermined its defense by blocking out all of the pertinent economic data which could have been supportive of its position. Thus, we are left with a record which shows that

[12] Cf. *Suburban Ford, Inc.*, 248 NLRB 364 (1980); *St. Regis Paper Company*, 247 NLRB 745 (1980).

Respondent failed to present any specific evidence concerning (1) the cost factors attributable to maintenance and operation of its trucks; (2) its delivery rates as compared with the rates charged by common carriers; (3) whether the need or desire to be competitive played any role in its decision to subcontract; (4) whether it was more efficient or expeditious to use one form of delivery rather than another; and (5) the delivery rates quoted by the contract carriers or how those rates compared with one another. In short, Respondent failed to adduce any detailed and specific evidence that it, in fact, would reduce its delivery costs by utilizing a contract carrier, or that it even had reason to believe that common carriers were more economical at the time of its refusal to recognize the Union. And this is true even if, as my colleagues assert, Respondent "previously had permission" to delete the specific information needed to support its economic defense, or that the documents were introduced into evidence "primarily to show that Respondent's inquiries were undertaken." Neither reason cures the defect. Respondent's defense is further undermined by its transfer of some of its too-expensive-to-run trucks to other of its plants where they are utilized to deliver similar products, as to which Respondent has failed to establish any substantial difference in weight or other characteristics from those produced at this plant.

Nevertheless, my colleagues argue that the decision to subcontract out was not motivated by unlawful considerations because the employees themselves were not aware of, and did not engage in, any union activity until after a final decision had been reached. But my colleagues have not stated precisely when that asserted decision was reached, and there is no evidence that it had been reached by mid-July when the employees discussed the possibility of becoming unionized and so notified Respondent; there is no indication from the evidence herein, except for Zabrosky's discredited conclusion, that the decision had been reached before the Union requested recognition; and my colleagues have failed to explain either the necessity for, or the impact of, Respondent's unlawful threat to "take the trucks off the road" following the Union's request for recognition if, in fact, a final decision had been made previously.

In view of Zabrosky's steadfast refusal to subcontract unless and until he obtained a special rate from one of the carriers—which he never got—it is fairly obvious that he either could not or would not have made a final decision to subcontract until he either knew what rate he could get, or got the special rate he was looking for. And even then, in processing his inquiries for a special rate, he was under a misapprehension that the carriers could, in fact, or would, grant him a special rate. Zabrosky's conduct—and there is nothing in this record to indicate that he was not acting with the full knowledge and consent of Respondent—indicates that Respondent had made a final decision not to subcontract unless it obtained a special rate, and that it eventually made the final decision to subcontract in November when it abandoned its quest for a special lower rate and accepted a proffered bid. Contrary to my colleagues, I have not forgotten that Zabrosky recommended a partial subcontracting several months earlier. The facts are, however, that Respondent neither subcontracted nor made a final decision to do so at that time, and Zabrosky's recommendation then that it do so has no bearing on the central issue of when a final decision to subcontract was reached.

The majority accuses the Administrative Law Judge of substituting his business judgment for that of Respondent because he noted that Respondent did not consider raising its prices as a means of solving its problem. In point of fact, however, he did not use his own business judgment; he merely pointed to an important economic fact which was missing. Nevertheless, Respondent's failure to adduce evidence in this regard is suspect and has a bearing on determining motivation, particularly because a possible resolution of Respondent's problem by that method could have resulted in a retention of the employees and their bargaining representative. Absent Respondent's consideration of the method, we are again left with Zabrosky's conclusionary discredited statement. These analytical observations concern an obvious evidentiary deficiency and hardly, contrary to my colleagues, amount to a substitution of my business judgment for that of Respondent.

Considering the plethora of evidence establishing a *prima facie* case and the paucity of rebuttal evidence, I find no warrant for my colleagues' comments that the Administrative Law Judge's rationale is ambiguous and his reliance on *Great Dane Trailers, Inc., supra*, misplaced. Respondent's conduct did seriously invade the employees' rights. Accordingly, I would find, in agreement with the Administrative Law Judge, that the General Counsel adduced sufficient evidence to establish a *prima facie* case that the drivers' union activities were a motivating, if not the sole, factor which formulated the decision to subcontract, and that Respondent failed in its burden of showing otherwise and thus violated Section 8(a)(3) and (5) of the Act.

Unlike the Administrative Law Judge, however, I do not regard the record as demonstrating that Respondent would not suffer a burdensome hard-

ship if required to resume the discontinued operation, and, therefore, I would not order restoration of the *status quo ante*. Instead, I would require Respondent to bargain over the effects of the decision to close the operation.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT coercively interrogate employees about their own or other employees' union activities.

WE WILL NOT warn employees that joining a union will not benefit them and will result in the termination of over-the-road driving jobs.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

LIBERTY HOMES, INC.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge: Pursuant to unfair labor practice charges filed by the Chauffeurs, Teamsters, Warehousemen and Helpers, Local No. 446, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the Union), against Liberty Homes, Inc. (herein the Respondent), and a complaint issued by the Regional Director for Region 18, a hearing was held in Medford, Wisconsin, on June 10, 1980. The issues litigated were whether the Respondent violated Section 8(a)(1) of the Act by various acts of interference with its employee Section 7 rights, and whether the Respondent violated Section 8(a)(5), (3), and (1) of the Act by refusing to recognize and bargain with the Union and by subcontracting the work of its transport drivers who had designated the Union as their bargaining agent.

On or about July 25, 1980, all parties filed briefs. On the entire record in this case including my observation of the witnesses, their demeanor and in consideration of briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, an Indiana corporation having its offices and principal place of business in Goshen, Indiana, is engaged in the manufacture, wholesale sale, and distribution of mobile homes in plants located in various States including a mobile home manufacturing plant at Dorchester, Wisconsin. During calendar year 1979, a representative period, the Respondent in the course and conduct of its operations sold and distributed goods valued in excess of $400,000 of which goods valued in excess of $50,000 were sold and shipped from the Respondent's Dorchester, Wisconsin, plant to customers located outside the State of Wisconsin. During the same period the Respondent purchased and received at its Dorchester, Wisconsin, plant goods and materials in excess of $50,000 directly from points located outside the State of Wisconsin.

It is admitted and I find that the Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

It is admitted and I find that the Union is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

The Respondent's production and maintenance employees at its Dorchester plant have been represented by another labor organization since 1972. That relationship has not been entirely tranquil. See *Liberty Homes, Inc.*, 216 NLRB 1102 (1975). The Respondent employs over-the-road truckdrivers at Dorchester to transport its mobile homes to customers in Wisconsin, Iowa, Idaho, North Dakota, South Dakota, Michigan, and Minnesota. Those drivers have not been represented by any labor organization. In 1973 the Union attempted to organize the drivers and sought recognition as their bargaining agent. The Respondent, however, subcontracts the delivery of its products to a common carrier. The Union filed an unfair labor practice charge which resulted in the issuance of a complaint which was resolved by a settlement agreement in Case 18-CA-3867.[1] The settlement agreement provided that the Respondent would, upon request, bargain with the Union concerning the effects of the 1973 subcontracting upon the drivers. Apparently

[1] The Respondent adduced into evidence the charge, complaint, and settlement agreement.

there was full compliance with the settlement agreement, as there was no suggestion to the contrary raised in the proceeding. That settlement agreement was not subsequently revoked by the Regional Director.

The chief operational manager at the Respondent's Dorchester plant is Wisconsin division manager, William C. Zabrosky. Subordinate to Zabrosky is dealer relations manager of the Wisconsin division, Tom Potts. Since 1972, Zabrosky possessed the ultimate authority for the operations of the Dorchester plant. Potts was directly responsible for the supervision of the drivers. Other managers were responsible for various other phases of the operation, e.g., the plant manager was responsible for production. Zabrosky confers with Potts on a daily basis. Potts advises Zabrosky of any problems that he encounters. Zabrosky in turn informs his superiors at the corporate headquarters, in Goshen, Indiana, of the existence of problems.

Subsequent to 1973, the Respondent resumed its delivery operations. In 1975, Kenneth Ploeckelman, who had been employed by the Respondent as a driver from 1970 to 1973, was rehired. He was the only driver, of the eight drivers terminated in 1973, to return to the employ of the Respondent. In 1975 three drivers were utilized. In 1977 the over-the-road driver complement rose to nine and remained at that number until November 1979.

The use of contract carriers was always used by the Respondent as a supplement to its own staff of over-the-road drivers. The use of contract carriers occurred on a monthly basis as the Respondent sought to clear its yard of an undelivered overflow. One of those contract carriers, Morgan Drive Away Inc., had been the recipient of the 1973 subcontracted work. Several of the Respondent's drivers performed services for Morgan after 1973. There was no explanation as to why the Respondent resumed its own delivery operations in 1975. Apparently it was to the Respondent's advantage to do so. The drivers remained unrepresented by a union.

B. *The 1979 Union Drive*

The General Counsel adduced the testimony of six drivers, Peter Marchinek, Kenneth Ploeckelman, James Paschke, Loren J. Metz, Dennis Gabrovic, and Merlin Ramker. Included in the testimony concerning the union organizing effort, there are accounts of conversations with Manager Tom Potts, which were uncontradicted. Potts, for no proffered reason, did not testify. Accordingly, I credit the testimony of the General Counsel's witnesses inasmuch as their testimony was not inherently unbelievable, and their demeanor was sufficiently convincing.

Marchinek was hired as a driver in February 1979. In June 1979 he and Ramker while together on a delivery engaged in a discussion concerning the possibility of seeking union representation. In various occasions in July and August he discussed individually with Ramker, Ploeckelman, and Pashke the subject of possible union representation. These discussions occurred on the Respondent's premises near the driver's room. Ploeckelman initially expressed his reluctance to seek union representation and cited his prior termination in 1973 after the last union effort.

Ramker, who was hired by Potts in February 1979, engaged in a conversation with Potts in mid-July. The conversation occurred at a bowling alley after Potts had picked up Ramker from a location where his truck had become inoperable. On the way back they stopped at the bowling alley for refreshment. During the conversation Ramker told Potts of the drivers' dissatisfaction with certain employment conditions and said that if improvements were not made that the drivers would "go union." Potts responded that, if they did seek union representation, such move would be a "bad mistake."

In July 1979, prior to Ploeckelman's discussion with Marchinek concerning union representation, Potts and Ploeckelman engaged in a conversation wherein Potts asked him if he were planning to attend a union meeting. Ploeckelman responded that he knew nothing about it. The record is silent as to any union meeting in July. Later Ploeckelman told Marchinek about Potts' interrogation, when Marchinek raised the subject of unionization with him.

Metz was hired on July 17, 1979, by Potts with whom he had been previously acquainted. Potts solicited Metz for the driver's job. On July 27 or August 3, on a Friday night Potts telephoned Metz at his home and asked him whether he had heard of any union meetings to be held that night. Metz said that he did not. Potts then asked him, "as a personal friend" not to attend union meetings. Metz responded that he was not interested in union representation inasmuch as he had intentions of entering into business himself and did not intend to continue as a driver "that long."

In early September 1979, Ramker engaged in a second conversation with Potts after he was summoned to Potts' office at 5:30 a.m. to commence his duties. As they were alone Potts asked him whether he had heard anything about the Union. Ramker said that he had not. Potts asked him whether he knew who had initiated the union effort. Ramker answered that he knew nothing about it.

On or about September 21, Ramker telephoned Union Business Agent Jerome Hansen and requested a meeting between Hansen and the Dorchester drivers. Hansen agreed and a meeting was set for Sunday, September 24, at Paschke's centrally located home. Thereafter all nine drivers were invited and all but Metz attended. The meeting lasted beyond midnight. Drivers Gabrovic, Kell, Marchinek, Ploeckelman, Paschke, Ramker, Schoelzel, and Strey executed valid written union authorization cards, thereby designating the Union as their bargaining agent. On the morning of Monday, September 24, Metz also executed a valid union authorization card and submitted it personally to Hansen at the Respondent's Dorchester plant where Hansen waited to confront Zabrosky. On September 24, accordingly, the Union had been designated the bargaining agent by all of the Respondent's over-the-road drivers.

On the morning of September 24, after Metz had executed his union authorization card, Business Agent Hansen met with Zabrosky in the Dorchester plant office. Hansen announced that the Union had been designated the collective-bargaining agent by the drivers and he requested recognition of the Union and bargaining.

Zabrosky responded that he lacked authority to extend recognition and that such authority resided with the corporate office in Goshen, Indiana. Zabrosky also told Hansen that he was "a dollar short and a day late." According to Zabrosky he told Hansen that a decision had been made to subcontract the work of the drivers to a common carrier. Hansen testified that Zabrosky stated that he was investigating the possibility of subcontracting the drivers' work and that he was at that time gathering information as to costs and negotiating with three contract carriers, Mobile Transport Systems, Inc. (herein MTS); Barrett Mobile Home Transport, Inc., (herein Barrett); and Morgan Drive Away, Inc., (herein Morgan); but that he had not as yet executed a contract. Hansen accused Zabrosky of repeating a "tactic" utilized in 1973 and asked whether the drivers would be "fired." Zabrosky responded that he preferred to use the word "terminated." Zabrosky said that he would file a representation petition with the Board and forward a formal letter to the Respondent. By letter dated September 24, addressed to Zabrosky, the Union demanded recognition and bargaining to commence on September 24. By letter dated September 26, Zabrosky responded:

> Your letter dated September 24 requesting recognition as exclusive representative of our drivers was received yesterday. The request that we meet with you on September 24 obviously cannot be acceded to, and, for the reasons we discussed, we must respectfully decline your request for recognition.

On the morning of September 25, Metz was notified to come to Potts' office. He met Potts in his office alone. Potts told him that as a friend he should have given him information concerning the union meeting. Potts asked Metz whether he had signed a union card and when he had signed it. Metz responded that he had signed a card on the day before at or about 10 a.m. Potts said that he did not think that the Respondent "would go along with joining a union," that it did not benefit Metz to join the Union, and that the Respondent "would probably take the trucks off the road." He told Metz that he "could have moved up the ladder to become a higher driver on the totem pole." Metz was the lowest in seniority.[2]

On September 26, the Union filed a representation petition in Case 18-RC-12417. A hearing was held on October 12, during which the Respondent took the position that the petition ought to be dismissed because a final decision had been made to subcontract the drivers' work. Testimony was adduced. During the course of the hearing, the Respondent offered to recognize the Union upon a demonstration of majority status in the form of authorization cards and offered to bargain with the Union thereafter concerning only the effects of the subcontracting of unit work. The Union declined the limited offer of recognition and insisted upon full recognition and bargaining.

On October 15, Zabrosky summoned the drivers to a meeting and announced that they would be terminated as of November 5, because their work was to be subcontracted to a common carrier. Zabrosky stated that the trucks used by the drivers might be offered for sale to them or that they might make arrangements to drive for the contract carriers. He told them that he did not know which contract carrier would be awarded the work.

On October 24, the Regional Director issued a Decision and Order wherein he concluded that the Respondent in mid-September 1979 had indeed reached a final decision to subcontract the unit work and he accordingly dismissed the petition. The Regional Director, of course, did not have before him the issue of the Respondent's motivation for the subcontracting. In any event he was precluded from litigating an unfair labor practice in a representation proceeding, inasmuch as the General Counsel has the sole authority to initiate unfair labor practice proceedings and the Regional Director was not then acting as an agent of the General Counsel. *Times Square Stores Corp.*, 79 NLRB 361, 364-365 (1948); *Cato Oil and Grease Company*, 242 NLRB 10, fn. 3 (1979). On or about November 2, the nine drivers were terminated. The 14 tractor-trucks utilized by them were sent to other mobile home manufacturing plants owned and operated by the Respondent in three other States. Of those 14 trucks, 3 were sold thereafter and 1 was demolished.

Zabrosky testified as to the circumstances leading up to the Respondent's decision to subcontract the delivery of mobile homes. Zabrosky, however, did not make that decision. David O'Connor, executive vice president at the Respondent's Indiana headquarters, made the decision. He did not testify. Zabrosky testified that he made certain recommendations to O'Connor. Zabrosky's testimony concerning the underlying economic conditions was generalized and unsupported by underlying documentation except for correspondence with potential subcontractees. According to Zabrosky he first considered subcontracting of the "haul away" operation in late 1978 or early 1979 because of the rising costs of the operation primarily due to more frequent malfunctioning of the motors and transmissions of the Respondent's gasoline-powered fleet of trucks. Zabrosky concluded that although his gasoline-powered vehicles could adequately haul Respondent's products, they could not sustain the increased wear due to a gradually increasing size and weight in the product. He testified that increased cost of maintenance adversely affected the profitability of the delivery phase of the operation. In 1977, the receipts from the charge to the customer for delivery service contributed $10,000 in profits to the overall operation. In 1978, the delivery operation lost $2,600. At the end of August, the cumulative loss reached $34,500, i.e., after all costs including wages, fuel maintenance, and fleet depreciation were subtracted from the flat rate delivery cost charged to the customer. Zabrosky's testimony did not give specific dollar amounts for each cost factor nor did it estimate what proportion of the costs were attributable

[2] The Respondent argues that Metz' testimony is inherently unbelievable because Metz admitted that Potts was aware that Metz intended to go into business for himself and that he had placed his house for sale and intended to move to another area. In the absence of contradictory testimony I credit Metz who appeared to be an objective, unbiased witness, possessed of no motivation to falsify testimony concerning his friend Potts. Potts may very well have intended to persuade Metz to stay on as an employee. It is not clear that Metz could not have retained employment at a new residence.

to maintenance. No testimony was adduced as to what proportion of these costs were attributable to the rising cost of gasoline in the summer of 1979. No data was submitted nor any specific comparison were made in his testimony with respect to the maintenance costs in 1978.

The income from the delivery operations was derived from a flat rate charged to the customer. The customer had no option to select its own means of delivery. Like the price for the finished product, the delivery charge was determined by the Respondent's Goshen headquarters. The delivery charge was thus simply added to the cost of the product. Historically the delivery charge was calculated upon such factors as en route costs, tolls, mileage, and other costs. In the past the delivery charge to the customer was the same regardless of whether the Respondent utilized a contract carrier or its own vehicle. Therefore, over several years, Zabrosky made continuing efforts to obtain a lower charge by the contract carriers with respect to the delivery cost charged to the customer. Zabrosky testified that he made recommendations to the Goshen headquarters as to the amount upon an evaluation of the costs charged by competitor mobile home builders, the wages of drivers, and his other costs. He did not state what his recommendations were. However, he testified that the headquarters "never" followed his recommendations. He did testify, however, that his superiors usually determined to increase those delivery rates. Zabrosky failed to testify that at any time from late 1978 until the date of the subcontracting did he recommend or even consider that the delivery rate charged to the customer be increased. There is no testimony as to how the Respondent's delivery rates compared to the competitor's delivery charges. There is no explicit testimony that the desire or need to be competitive played any role in the decision to subcontract. There was no testimony as to whether it was more efficient or expeditious to use one form of delivery rather than another form. Zabrosky testified that he was unaware of how the Respondent's delivery charge compared to the charge a common carrier would levy upon a customer for the same delivery.

From late 1978 or early 1979, and continuing through the summer of 1979, Zabrosky testified that he attempted to obtain a special rate from contract carriers. He had been aware that the rate charged by a contract carrier is controlled by the Interstate Commerce Commission, but he reasoned that perhaps a special rate could be obtained if he promised to assign all his business to one carrier. As explained by Jerry Heiring, of Morgan, in his testimony as a witness for the Respondent, each contract carrier must charge the same rate to all its customers for the same size product delivered at the same distance, but each carrier's rates vary somewhat though not substantially, for competitive reasons, from one and another. However, Heiring testified that although rates may be approximately the same, each carrier will not necessarily charge the same fee for a delivery of the same size, because each carrier may differ from one and another in the way in which they compute the mileage for that delivery. Thus different carriers may submit different quotations of costs for the same size product to be delivered to the same location. Zabrosky, however, engaged in an effort to obtain a special lower rate for the Respondent. On March 1, 1979, MTS submitted a written quotation of rates to be charged for the Respondent. However, MTS did not have authority from the ICC to service the Dorchester area and its bid was premised upon an assumption that it could obtain such authority.

On May 14, 1979, a Barrett representative visited the Dorchester plant and discussed the assumption of the Respondent's delivery operation. This was one of several such conversations. However, Barrett declined to provide the Respondent with a special rate.

Heiring testified that in August he paid a routine visit to the Dorchester plant and that Zabrosky offered to award all the Respondent's delivery work to Morgan in return for a special rate. According to Heiring this was a continuation of efforts by Zabrosky in early 1979 and through that summer. Heiring refused to agree to a special rate. Heiring testified further that Zabrosky's efforts to obtain a special rate were not new, and that Zabrosky had periodically since 1975 attempted to obtain a special rate from him including a period of time when Heiring was employed by Barrett. Heiring testified that each time Zabrosky was insistent upon a special rate but each time Heiring was adamant in his refusal.

On August 27, MTS submitted a second written bid setting forth proposed rates, conditioned upon approval of the ICC for MTS to service Dorchester. Zabrosky testified that MTS was the only carrier to offer him a special rate but that he felt that it was insufficient and he therefore continued in his efforts to obtain a better rate. No evidence was submitted as to the amount of the rates that these carriers offered. On September 3, Barrett sent a letter to the Respondent wherein it promised to submit a quotation or estimate of costs on actual shipments. This was the first response from Barrett. On September 27, after the Respondent declined recognition of the Union, Barrett submitted to the Respondent those cost estimates. On October 8, Heiring, of Morgan, forwarded to the Respondent a written expression of interest in assuming the Respondent's delivery work and it submitted therewith, pursuant to Zabrosky's request, quotations of delivery costs for the Respondent's various products to a variety of locations. No special rate was offered by Barrett or Morgan.

Although these quotations of different contract carriers may have varied, there is no evidence adduced of the amounts of the quoted costs, nor evidence as to how they compared with one and another. There was no evidence submitted by the Respondent as to whether it had entertained a specific objective as to the delivery charge sought from the common carriers, or whether it had decided upon a delivery charge which would be economicially benefical in comparison with the cost entailed by its own operation. Although Zabrosky requested that these carriers submit written quotations, in his testimony he conceded that he could have obtained the same information by telephone, and that he ultimately entered into no written contractual agreement to use the exclusive services of any one carrier. He testified that after November 5, 1979, he compared the written quotation submitted, and that he thereafter engaged the services of that carrier which had submitted the lowest quotation

for the delivery of a particular mobile home for that specific delivery point. No evidence was submitted as to the comparison of these quoted estimates to the Respondent's actual past costs. Although it is implied throughout the Respondent's argument that it was guided by economic motivations there is no conclusive detailed and specific evidence adduced that the Respondent, in fact, reduced its delivery costs by utilizing the contract carriers, or that it had reason to believe that the common carriers were more economical at the time it refused to recognize the Union.

With respect to the precise date that the Respondent decided to terminate its delivery operations, Zabrosky's testimony is confused and inconsistent. In direct examination Zabrosky testified that he considered the exclusive use of subcontractees in early 1979, but that in the summer of 1979 he also considered cutting his maintenance costs by the acquisition of diesel-powered trucks which, although initially costly, entail far less wear and maintenance. Accordingly, he requested sometime in the summer of 1979 of the Respondent's Vice President Deck in Goshen, Indiana, that a feasibility study be made for the acquisition of diesel trucks and that thereafter on some unspecified date he received a response from Deck that such a move would be "horrendously" expensive. Zabrosky testified that a gasoline tractor costs about $5,000 whereas an equivalent diesel costs about $35,000. No specific evidence was adduced as to what data the Respondent possessed prior to the subcontracting, as to the cost of leasing diesel trucks. Zabrosky testified that he requested such a study several weeks prior to this hearing.[3] No specific evidence was adduced as to an analysis of the reduction in maintenance costs as an offset to the initial capital investment in diesel tractors. No evidence was submitted as to the Respondent's inability to absorb the capital investment in diesel tractors.

However, despite the "horrendous" nature of the expense of acquiring diesel power, Zabrosky testified on direct examination that he made a twofold recommendation to his superiors: (1) that they provide him with a fleet of diesels or (2) they authorize him to subcontract the delivery operation.[4] In direct examination he testified that he was notified by Vice President O'Connor on August 15 of the decision to subcontract the delivery work to a common carrier. In cross-examination he conceded that at the representation proceeding he testified that the decision was made in mid-September. He explained that at the representation hearing he had testified "cold" and without refreshing his recollection with records and that he was in error when he so testified in October 1979, barely 60 days after the decision was purportedly made.

Further in cross-examination Zabrosky testified that he had not only recommended sometime in the summer of 1979 that the delivery work be terminated, but that he started making such recommendations in March and continued to make such recommendation at "every opportunity." When reminded of his prior testimony Zabrosky then testified that he coupled his recommendations with an alternative recommendation that only half of his fleet need be replaced by diesel tractors. He was silent as to his superiors' responses, if any, to these earlier recommendations.

Thus the evidence reveals that the Respondent did in fact consider the subcontracting of its driveaway operations, and did communicate with possible subcontractees and did seek special rates in return for an exclusive subcontractual arrangement in the spring of 1979, and throughout the summer of that year. However, it also contemplated the replacement of half its fleet with diesel trucks as a means of combating the rising costs of maintenance. Surely it must also have considered the possibility of raising its delivery charges. However, it is also apparent that no final decision was made until after the Respondent acquired knowledge of the union organizing discussions among its employees and after Potts became suspicious that union meetings were being held and commenced his interrogations and his monitoring of the employees' increasing interest in the Union. I do not credit Zabrosky's testimony that he was not aware of the employees' union sympathies until Hansen's September 24 visit. Potts was actively involved in the process of gathering data in reference to the possibility of total subcontracting. He directly supervised the drivers and daily reported any problems to Zabrosky. Clearly, as his conversations with employees reveal, he considered union organization of the drivers to be a matter of concern.[5] It is inconceivable that he did not report his suspicions to Zabrosky or to Vice President O'Connor. I conclude that the Respondent was fully aware of the renewed desires of its employees for union representation before it finally decided to subcontract their work.

Furthermore, there is additional evidence that the continuation of in-house delivery was considered as equally a viable prospect as subcontracting in early 1979 and into the summer months. Two new gasoline-powered tractors were acquired in the spring of 1979. In the summer months a second gasoline storage tank of 10,000-gallon capacity was installed which doubled the fuel storage capacity for the gasoline-powered trucks.[6] Also four trucks were equipped with complete sets of new radial tires despite the Respondent's past practice of using recapped tires for some of the wheels. It is apparent that the Respondent's economic situation was not such as to preclude it from making capital investments in the Dorchester haul away operations prior to the Union's demand for recognition.

I do not credit Zabrosky's testimony that a final decision was made on August 15. I do not credit his testimony that he told Hansen that a final decision had been made. I credit Hansen that Zabrosky had told him that the Respondent was still gathering data as of September 24, and that it was only considering the possibility of

[3] Testimony concerning the acquisition of such information subsequent to the alleged unfair labor practice was excluded as irrelevant.

[4] In cross-examination he testified that he had recommended that only one half of the fleet be replaced with diesels.

[5] Had a final decision to subcontract been made Potts surely would have been aware of it and accordingly the prospective organization of his drivers would have been only of academic interest to him. At no time did he tell the drivers that a decision had been made.

[6] The record is silent as to whether these tanks can also accommodate diesel fuel.

subcontracting up to the date of his confrontation. Zabrosky was inconsistent in his testimony which as a whole was generalized, vague, and conclusionary. Zabrosky's demeanor was hesitant and uncertain. Furthermore, as of September 23, Zabrosky had not been successful in his efforts to obtain the special rate that he felt would be satisfactory. The proposed MTS rates were unsatisfactory. Moreover, Zabrosky did not know whether MTS even applied to the ICC for authority to service the Dorchester area. The other carriers refused a special rate and had not yet submitted actual quotations. It is improbable that a final decision would have been made prior to the acquisition of all economic data. Accordingly, I conclude that no decision had been made until the Respondent became aware of its drivers' union activities and the Union had demanded recognition.

The Respondent argues that the decision to subcontract was known to the drivers prior to their union efforts and that is what motivated them to seek representation. All drivers who testified asserted that they were first aware of the decision to subcontract after they had executed their union authorization cards. However, Ramker testified in response to a series of questions on cross-examination as to what Hansen discussed with the drivers at a meeting with them on September 29. He was asked whether Hansen told them about Zabrosky's reference to the subcontracting. He responded:

> That's old news. We knew that was going to happen. I mean if you take the trucks off somebody's going to haul them away for them.

However, it is not clear when this became "old news," and how it was obtained, or whether it was merely Ramker's subjective conclusion based upon an awareness of Potts' threat to Metz on September 25 that the Respondent would not "go along" with the Union but would instead "take the trucks off the road." Thus Ramker's testimony is not supportive of the Respondent's contention that a final decision to subcontract had already been made prior to September 24. At the very most it may indicate that the drivers had become aware of the Respondent's consideration of the possibility of subcontracting, and were thus motivated to seek union representation prior to the finalization of such a decision. However, I credit the testimony of the drivers that as of September 24 they were unaware of any decision to subcontract their work.

B. *Conclusions*

1. Interrogations—warning

In July, Potts interrogated Ploeckelman as to whether he planned to attend a union meeting. On July 27 or August 3, Potts interrogated Metz by telephone as to whether he heard about any union meeting and asked him not to attend any meeting. In early September, Potts, in his office, interrogated Metz again as to his awareness of union activities, and as to the identity of the employee who initiated union organizing efforts. On September 25, Potts summoned Metz to his office and reproached him for not reporting information as to the union activities of fellow employees, asked him whether he had signed a union card, and warned him that it was against his interest to join the Union because the Respondent would not tolerate union representation of the drivers but would rather terminate its delivery operations.

During these interrogations of employees concerning their own and their coworkers' union activity that preceded the September 24 demand for recognition, no valid purpose existed for such interrogation. During all the interrogation no valid purpose was conveyed to the employees, and no assurances against reprisals were given to the employees. Some of the interrogations occurred at the situs of managerial authority. One of the interrogations was accompanied by a threat of economic reprisal. Accordingly, I conclude that each of the foregoing interrogations by the Respondent's manager and agent, Tom Potts, was coercive and constituted a violation of Section 8(a)(1) of the Act. *N.L.R.B.* v. *Camco, Inc.*, 340 F.2d 803, 804 (5th Cir. 1965), cert. denied 382 U.S. 926; *Paceco, a Division of Fruehauf Corporation*, 247 NLRB 1403 (1980).

Furthermore, by Potts' warning to Metz that if he joined the Union it would not benefit him and would result in the loss of the drivers' jobs, the Respondent violated Section 8(a)(1) of the Act. *Unimedia Corporation*, 235 NLRB 1561, 1569 (1978).[7]

2. Termination of operation

The Respondent's animosity toward its employees' organizational activities is evident from its coercive interrogations and the threat of economic reprisals.[8] A decision to terminate the work of the drivers occurred after they had sought union representation, after the Respondent had monitored the drivers' growing interest in the Union, and in the context of expressed animosity toward their union activities. The drivers were unaware of any decision to subcontract their work at the time they designated the Union as their bargaining agent. Thus, to all outward appearances the Respondent had engaged in its normal functions, purchased new trucks, tires, and gasoline facilities, and then, as it had in 1973, terminated its delivery services after the drivers selected a union as bargaining agent. The only conclusion to be drawn by the drivers as well as other employees at Dorchester and employees throughout the Respondent's various plants is that the Dorchester drivers were punished because they had attempted to unionize, and that the Respondent subcontracted their work to avoid bargaining with the Union at Dorchester as Manager Potts had warned driver Metz.

Ordinarily motivation is determinative of whether Section 8(a)(3) has been violated. The Supreme Court has stated in *N.L.R.B.* v. *Great Dane Trailers, Inc.*:

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[7] The fact that Metz may have been a friend of Potts does not detract from the coercive nature of the threat and interrogation. *Quemetco, Inc.*, 223 NLRB 470 (1976); *Florida Steel Corporation*, 224 NLRB 45 (1976).

[8] I do not rely upon the presettlement conduct of 1973 nor the fact that a settlement was effected as the settlement agreement was never revoked and no evidence of motivation was adduced as to the 1973 shutdown of trucking operations.

> Some conduct, however, is so "inherently destructive of employee interests" that it may be deemed proscribed without need for proof of an underlying improper motive. *Labor Board* v. *Brown, supra* at 287; *American Ship Building Co.* v. *Labor Board, supra* at 311. That is, some conduct carries with it "unavoidable consequences which the employer not only foresaw, but which he must have intended" and thus bears "its own indicia of intent." *Labor Board* v. *Erie Resistor Corp., supra* at 228, 231. If the conduct in question falls within this "inherently destructive" category, the employer has the burden of explaining away, justifying or characterizing "his actions as something different than they appear on their face," and if he fails, "an unfair labor practice charge is made out." *Id.*, 228. And even if the employer does come forward with counter explanation for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the evasion of employee rights in light of the Act and its policy.[9]

The Court further stated that, "If it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if an employer introduces evidence that the conduct was motivated by business considerations."[10]

Herein, the Respondent by its coercive conduct has given its employees the impression that it has decided to terminate its Dorchester trucking operations because of the Dorchester drivers' union activities. By its own conduct, the Respondent has created a situation whereby, regardless of actual motivation, the subcontracting of unit work has necessarily become inherently destructive of employee rights. Under such circumstances, the burden of proving that the sole motivation for its conduct was economic must rest upon the Respondent. *Saginaw Aggregates, Inc.*, 191 NLRB 553, 555 (1971); *Allied Mills, Inc.*, 218 NLRB 281, 289 (1975); cf. *Smyth Manufacturing Company, Inc.; Beacon Industries*, 247 NLRB 1139 (1980).

Furthermore, the General Counsel has adduced sufficient evidence to support an inference that the drivers' union activities were at least a motivating, if not sole, factor in the formulation of the final decision to subcontract the work of the drivers. Accordingly, the burden shifted to the Respondent to demonstrate that it would have subcontracted the drivers' work in the absence of the union activity. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

The Respondent herein has not only failed to demonstrate that the elimination of the drivers' jobs would have occurred in any event, it also failed to demonstrate that it was guided in part by economic motivations. At best the Respondent adduced generalized testimonial evidence that it had experienced a rising maintenance cost and a loss of profits in the haul away operation and that it had considered subcontracting as one of two alternative courses of action prior to the union organization of its drivers. As noted above, a third alternative also existed: raise the delivery charge of its product. Certainly the Respondent had found it advantageous and desirable to perform its own delivery work inasmuch as it had reversed its 1973 decision and resumed its haul away operation in 1975. There is no evidence that the fees paid to the common carriers had not risen since 1975. Moreover, the very trucks that were deemed to be too expensive to operate were transferred to other of the Respondent's plants and continued to be utilized at those plants to deliver its products. No convincing, probative evidence was submitted that at the time of the decision to subcontract the Respondent had before it full and complete data which revealed that subcontracting was more economical and effective than a continuation of its haul away operation. I conclude that the employees' protected activities were the sole factor which motivated the Respondent, and that it subcontracted the work of the drivers because they joined, supported, or assisted the Union and to discourage them from engaging in such activities or other mutual aid or protection and, thus, violated Section 8(a)(3) and (1) of the Act.

3. The refusal to bargain

As found above, the Union, as of September 24, was designated collective-bargaining representative by all of the Respondent's over-the-road drivers. The Respondent, while not admitting the appropriateness of the driver unit, explicitly stated at the hearing that it had no objection to the appropriateness of such unit.

The Board has held that a union need not be bound to represent the most appropriate unit, but rather it has concluded that the Act mandates only that the unit be an appropriate unit. *Morand Brothers Beverage Co., et al.*, 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951). Based upon the record, I conclude that a unit of all full-time and regular part-time over-the-road drivers employed by the Respondent and operating at its Dorchester, Wisconsin, facility, excluding office clerical employees, professional employees, production and maintenance employees, all other employees, guards, and supervisors as defined in the Act, is a unit appropriate for purposes of collective bargaining.

The Respondent, therefore, refused to recognize and bargain with the majority representative of an appropriate unit of over-the-road drivers and terminated the jobs of all members of the bargaining unit for the purpose of evading its bargaining obligations.

The Supreme Court has held in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), that an employer violates Section 8(a)(5) of the Act when it refuses to recognize and bargain upon demand with a union whose majority status is established by valid authorization cards when the contemporaneous unfair labor practices of the employer are likely to destroy the union's majority and seriously impede the election process. The Board has held, citing the *Gissel* decision that a violation of Section

[9] 388 U.S. 26, 33-34 (1967).
[10] *Id.*, 34.

8(a)(5) occurs "whether the unfair labor practices triggering the finding that the employer was under an obligation to bargain occur before, at the same time, or after the actual refusal to bargain." *Pilot Freight Carriers, Inc. and BBR of Florida, Inc.*, 223 NLRB 286 (1976). The Supreme Court has stated:

> If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. [*Gissel*, 395 U.S. at 615-615.]

Under the guidelines as set forth by the Supreme Court, the Board has concluded that a bargaining order is appropriate even under circumstances where the unfair labor practices of the employer were not extensive with respect to frequency or number of unfair labor practices committed, but where because of the nature of the unfair labor practice and its circumstances, e.g., a single threat to close down a plant or the granting of benefits within a small unit, it would have been unlikely to have conducted a fair election. *C & T Manufacturing Company*, 233 NLRB 1430 (1977); *Crago Gear & Machine Works*, 236 NLRB 539 (1978); see also *Unimedia Corporation*, 235 NLRB 1561 (1978), involving critically timed discriminatory layoffs of employees.

The foregoing described unlawful interrogation, a managerial warning of termination of delivery operations in a small unit susceptible of the dissemination of such harmful influence, and the discriminatory discharge of the entire unit of drivers constitute conduct which is egregious, and which manifests an inevitable long-term effect. The Respondent's pervasive reaction to its employees' desires for union representation reveals a strongly entrenched antipathy. It is most probable that if an election were directed among the reinstated drivers that the Respondent would resume its unlawful conduct. Moreover, the severity of its unfair labor practices herein clearly tend to undermine the majority status of the Union and impede the election process. Because of the lasting effect of and substantial probability of the repetition of unfair labor practices I conclude that the holding of a fair election is a futility. Accordingly, I find that the Respondent on September 24 breached its obligation to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act and that an issuance of a bargaining order is warranted.

I further find that thereafter the Respondent breached its bargaining obligations and violated Section 8(a)(5) and (1) of the Act by notifying the over-the-road drivers on October 15 that their work would be subcontracted and by unilaterally subcontracting the work of the over-the-road drivers on November 5, 1979, without prior bargaining with the Union.

CONCLUSIONS OF LAW

1. Liberty Homes, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Chauffeurs, Teamsters, Warehousemen and Helpers, Local No. 446 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating employees concerning their own and other employees' union activities, the Respondent has violated Section 8(a)(1) of the Act.

4. By warning employees that joining the Union will not benefit them and it will result in the loss of over-the-road driving jobs, the Respondent has violated Section 8(a)(1) of the Act.

5. By subcontracting its over-the-road operations and terminating the employment of its drivers, Dennis D. Gabrovic, Roger C. Kell, Peter J. Marchinek, Loren J. Metz, Jimmy L. Paschke, Kenneth F. Ploeckelman, Merlin J. Ramker, Dennis D. Schoelzel, and Arthur B. Strey because they joined, supported, or assisted the Union and to discourage them from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection, the Respondent has violated Section 8(a)(3) and (1) of the Act.

6. All full-time and regular part-time over-the-road truck drivers employed by the Respondent and operating out of the Respondent's Dorchester, Wisconsin, facility, excluding office clerical employees, professional employees, production and maintenance employees, all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

7. Since September 23, 1979, the Union has been and is the collective-bargaining representative of the Respondent's employees in the unit found appropriate.

8. By refusing to recognize and bargain with the Union as the collective-bargaining representative of its employees in the appropriate unit on or after September 24, 1979, by unilaterally informing the drivers employed in the above unit, on October 15, 1979, that their work would be subcontracted, and by unilaterally subcontracting the work of the aforesaid drivers on November 5, 1979, without bargaining with the Union concerning the decision to subcontract that work, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

I recommend that the Respondent be ordered to cease and desist from its unfair labor practices and post an appropriate notice.

I have found that the Respondent discriminatorily terminated its over-the-road drivers and subcontracted their work, on an *ad hoc* basis, to common carriers. The appropriate remedy is reinstitution of its over-the-road delivery operations and reinstatement of the drivers. This is in accord with the policy of the Board that, with respect to discriminatory conduct, "the restoration of the *status quo ante* is the proper remedy unless the wrongdoer can

demonstrate that the normal remedy would endanger its continued viability." *R & H Masonry Supply, Inc.*, 238 NLRB 1044 (1978). See also *Hood Industries, Inc. and its wholly owned subsidiary, B & K Transportation, Inc.*, 248 NLRB 597 (1980). In the instant case the Respondent merely transferred its trucks to its other plants where they continued in use except for three that were sold thereafter and one that was demolished. There is no evidence in this record that the restoration of the *status quo ante* would entail a threat to the Respondent's economic viability or constitute a burdensome hardship. Accordingly, I recommend that the Respondent be ordered to reinstate its over-the-road truckdriving operations at its Dorchester plant and reinstate to their former positions or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, Dennis D. Garbovic, Roger C. Kell, Peter J. Marchinek, Loren J. Metz, Jimmy L. Paschke, Kenneth F. Ploeckelman, Merlin J. Ramker, Dennis D. Schoelzel, and Arthur B. Strey, and shall make whole all of them for any loss of earnings they may have suffered by reason of the discrimination against them. Any backpay found to be due shall be computed in accordance with a formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon, to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[11]

It will be further recommended that the Respondent be ordered to bargain upon request with the Union as the exclusive bargaining representative in the appropriate unit concerning wages, hours, and other conditions of employment, including subcontracting of unit work, and if any understanding is reached embody such understanding in a signed agreement.

In view of the egregious and pervasive nature of the unfair labor practices engaged in by the Respondent, I recommend a broad remedial order. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]

[11] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).